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No. 93-1899

In The

Supreme Court of the United States

October Term, 1993

ELOY GENER PEREZ and GRACIELA ALMODOVAR,

Petitioners,

vs.

NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether current parental unfitness is a constitutional prerequisite in order to terminate parental rights.

2. Whether *N.J.S.A.* 30:4C-20 is unconstitutional because it does not require a finding of current parental unfitness in order to terminate parental rights.

3. Whether *N.J.S.A.* 30:4C-20 was unconstitutionally applied in this case to terminate parental rights because the court did not find that the parents were unfit at the time of trial.

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BRIEF IN OPPOSITION

Counter-Statement of the Case

This case involves a challenge to an order terminating parental rights as to a 5 year old upon a clear and convincing demonstration that the child will suffer short and long term psychological harm if he were to be removed from his foster parents and forced to construct a relationship with his birth parents. On Petitioners' first appeal of the termination of their parental rights in 1992, the New Jersey Appellate Division questioned whether the trial court's reliance on psychological bonding constituted sufficient grounds for termination under two recently issued New Jersey Supreme Court cases, *In the*

Matter of the Guardianship of J.C. and J.M.C., 129 *N.J.* 1, 608 *A.*2d 1312 (1992), and its companion, *In the Matter of the Guardianship of K.L.F.*, 129 *N.J.* 32, 608 *A.*2d 1327 (1992), which give direction to the New Jersey courts regarding the rigorous standards which must be applied when psychological bonding theories are a factor in a decision to terminate parental rights. Therefore, the matter was remanded on July 17, 1992, for reconsideration in light of those two decisions (Pa19a-22a). Upon remand, the court again terminated parental rights, finding that the evidence was clear and convincing that O.G. would suffer serious and enduring psychological harm if removed from his foster parents. (Pa8a-11a). The trial court issued an opinion dated November 9, 1992, in which it conducted an additional review of the evidence in light of the recent State Supreme Court decisions and determined that, even under the newly articulated stricter scrutiny directed by the court, termination of parental rights was warranted (Pa13a-17a). That decision was affirmed by the Appellate Division (Pa2a-3a) by decision dated October 22, 1993, with review by the Supreme Court of New Jersey denied by order dated February 8, 1994 (1a).

The basis for Petitioners' challenge of the trial court's decision to the state appellate courts was the failure of the Division's proofs to meet the applicable standard set forth in *New Jersey Division of Youth and Family Services v. A.W.*, 103 *N.J.* 591, 512 *A.*2d 438 (1986). Petitioners repeatedly argued that the State had not proven its case. However, the Appellate Division's affirmance of the trial court's second decision not only cited the trial judge's "thorough and thoughtful consideration" of both the proofs and of the applicable law, but also found the

decision justified by its own consideration of the record and of the law. Thus, the court's finding that O.G. would sustain significant permanent harm if he were to be removed from his psychological parents and that his relationship with them had grown during the most critical period in his psychological development during which his own parents had been "crippled" in their ability to function was a harm attributable to the parents (Pa10a-13a).

Thus, contrary to Petitioners' assertions that there was no finding of parental unfitness (Pb5) the trial court specifically found that Petitioners were unable to function as parents for almost two years, and that it was their inability to care for their son for those years that had permitted the development of a bond between him and his foster parents, the severance of which would cause him severe and enduring psychological harm. (Pa8a; 12a). Apparently, Petitioners believe that there must be a showing of present unfitness at the point of termination, notwithstanding a history of unfitness resulting in long-term foster care placement which creates a bond between the child and his foster parents that is of such significance that its severance would cause the child serious psychological harm. However, this is a position unsupported by law and one which significantly impairs a child's interest in securing a safe, stable and permanent home.

On May 13, 1994, the Family Court denied Petitioners' request for a Stay and entered a Judgment of Adoption allowing O.G. to be adopted by his foster parents.

Argument

The writ should be denied as this case presents no substantial constitutional questions not previously decided by this Court, because the procedural due process issue and the constitutionality of the New Jersey statutes governing termination of parental rights were not raised below, and because the decision of the Appellate Division is fully consistent with this Court's decisions involving a parent's Fourteenth Amendment rights.

A. The issues whether: a) *N.J.S.A.* 30:4C-20 is constitutional and b) whether the Petitioners were denied procedural due process were not raised in or passed upon by the state courts, and therefore should not be considered by this Court.

It is well-settled that this Court does not assume jurisdiction "to re-examine the final judgment of a state court [unless] the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 *U.S.* 493 (1981), *citing, New York ex rel. Bryant v. Zimmermann*, 278 *U.S.* 63 (1928). Contrary to this principle, the Petitioners have raised two issues which were not raised in nor passed upon by the state court.

Initially it must be noted that, as posed, the first two questions presented for review are indistinguishable. The first query is "[w]hether the application by the New Jersey Courts of the best interests standard to terminate parental rights is unconstitutional," and the second is "[w]hether the best interests of the child standard was erroneously applied thus resulting in a wrongful termination of the petitioners' parental rights." Nevertheless,

from the argument offered in support of these issues, it appears that the first question posed is whether *N.J.S.A.* 30:4C-20, the New Jersey statute providing for termination of parental rights under a "best interests of the child" standard is unconstitutional insofar as it enables a court to terminate the rights of a currently fit parent based on a theory of psychological or physical harm to a child.

However, this constitutional challenge to New Jersey's statutory "best interests of the child" standard was never raised in the trial court, on the first appeal, on remand, on the second appeal, or on Petition for Certification to the New Jersey Supreme Court. Nor did Petitioners attack the constitutional sufficiency of the decision in *New Jersey Division of Youth and Family Services v. A.W.*, 103 *N.J.* 591, 512 *A.*2d 438 (1986), which formulated the standards to be met when termination of parental rights is sought under a "best interests" theory.[1] To the contrary, as the bulk of Petitioners' argument below maintained that the State had failed to meet the requirements of *A.W.*, it would appear that Petitioners had presumed *A.W.*, and therefore the statute, to be constitutional. Moreover, no discussion or even mention of the constitutionality of the best interests standard appears anywhere in the Petitioners' briefs below, nor was the question raised at oral argument. In fact, no citation to *N.J.S.A.* 30:4C-20, *N.J.S.A.* 30:4C-15, or *N.J.S.A.* 30:4C-15.1 appears in any of Petitioners' briefs below.

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[1] The four-pronged test established by the *A.W.* decision has been codified in *N.J.S.A.* 30:4C-15.1.

Additionally, Petitioners now assert that they were denied procedural due process when the Division did not act promptly on an alleged revocation of a voluntary placement agreement on April 20, 1989. However, the record conclusively shows that this issue was not raised below. Even assuming, *arguendo*, that Petitioners' point is well-taken, the record reveals that it was never established at trial that a revocation occurred. Rather, the alleged revocation consists of a statement by the natural father to a caseworker on April 20, 1989, as memorialized in the caseworker's notes, that he wanted the children back and that he will be looking for an apartment. However, on the same date in 1989, Mr. Perez also indicated to the caseworker that his current housing was temporary, in need of repair and not appropriate for children. While, at trial on February 28, 1991, counsel for Petitioners characterized the April 20, 1989, conversation, as a "revocation," the Division maintained that Mr. Perez had simply indicated his intention to work towards the return of his children. During the same conversation, he referred to himself as a "drug user", admitted that neither he nor the children's mother had a home for the children and maintained that if Ms. Almodovar was given the children, he would "kill her and himself." (Transcript of proceedings dated 2/28/91 at 42-19 to 25; 44-24 to 45-17; 46-7 to 9; 48-9 to 21). There was never a finding by the court that a revocation had occurred. Rather, the court found that it was the Division's assessment of the parents' lack of progress toward the reunification, not any "revocation" of the placement agreement, that precipitated the Division's custody litigation (Pa7a).

This Court may easily deduce the lack of proper presentation of the above issues from the failure of the New Jersey courts, in four written decisions below, to pass upon or even mention whether, in its opinion, the "best interests" standard is constitutional, or whether Petitioners were denied procedural due process. *See Webb v. Webb, supra,* 451 *U.S.* 493. Therefore, these issues should not be considered for the first time here. Regardless, in addressing the third question presented by Petitioners, the state will demonstrate that New Jersey's statutory scheme is fully consistent with this Court's decisions involving due process requirements in termination proceedings.

B. The State court decision below is fully consistent with this Court's decisions involving a parent's Fourteenth Amendment rights.

In New Jersey, termination of parental rights requires proof that a child has been harmed by parental behavior and that the parent has not relieved or cannot relieve the harm. The state's authority to seek termination of parental rights is governed by both statutory and decisional law. *N.J.S.A.* 30:4C-15 authorizes the state's child protection agency (the New Jersey Division of Youth and Family Services) to file a petition seeking termination of parental rights wherever it appears that the best interests of any child require such a remedy. *N.J.S.A.* 30:4C-15(c). *N.J.S.A.* 30:4C-15.1 sets forth in detail the meaning of best interests. That test codifies an earlier holding of the New Jersey Supreme Court set forth in *New Jersey Division of Youth and Family Services v. A.W.*, 103 *N.J.* 591, 512 *A.*2 438

(1986). In *A.W.*, the Court directed that a best interests inquiry required satisfaction of the following standard:

1. The child's health and development have been or will be seriously impaired by the parental relationship;

2. The parents are unable or unwilling to eliminate the harm and delaying permanent placement will add to the harm;

3. The court has considered alternatives to termination;

4. The termination of parental rights will not do more harm than good.

When the New Jersey court defined what it considered the appropriate outlines of a best interests analysis, it did so with full recognition of the constitutional significance of parental interests. Citing *Stanley v. Illinois*, 405 *U.S.* 645 (1972), the court in *A.W.* recognized that "the interests of parents in this relationship have thus been deemed fundamental and are constitutionally protected." *Id.* at 599. In the same decision, the court also acknowledged the constitutional requirement of the clear and convincing standard of proof required by *Santosky v. Kramer*, 455 *U.S.* 745 (1982). Nevertheless, the court also emphasized the settled principle that the state has "constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham v. J.R.*, 442 *U.S.* 584, 603 (1979); *Wisconsin v. Yoder*, 406 *U.S.* 205, 230 (1972). Although the state must act with due deference to the privacy of the family relationship, its *parens patriae* obligation gives it "protective jurisdiction over children when their physical

or mental health is jeopardized." *DYFS v. A.W., supra* at 600.

According to New Jersey law, the central question to be decided in an application to terminate parental rights is the extent of the injury to the child arising from the existing parental relationship – whether the injury has already occurred or whether there is a potential for the injury if the parental relationship is resumed. The question that must be answered is "whether it is reasonably foreseeable that the parents can cease to inflict harm upon the children entrusted to their care. No more and no less is required of them than that they will not place their children in substantial jeopardy to physical or mental health." *DYFS v. A.W., supra* at 607. While the court did cite parentally inflicted physical and sexual abuse as examples of harm which might justify termination, clearly the court did not limit itself to those two examples as suggested in Petitioners' brief (Pb24). Indeed, the court held that "in some cases, the potential for emotional injury can be the crucial factor in child placement . . . the potential return of a child to a parent may be so injurious that it would bar such an alternative" *DYFS v. A.W., supra* at 604-605.

In a subsequently decided case, *Matter of Guardianship of J.C.*, 129 *N.J.* 1, 608 *A.*2d 1312 (1992), the court focused exclusively on just this type of injury. That case concerned the situation where the Division seeks termination of parental rights "not on grounds of current unfitness, but because of potential harm to the child based on separation from a foster parent with whom the child has bonded." *Id.* at 18. In deciding that such an injury constitutes a harm which, in an appropriate case, could lead to

termination of parental rights, the court reiterated its awareness of the federal constitutional significance of parental rights at stake. Thus, the court held that if current parental unfitness was not being alleged, "the quality of the proof adduced must be consistent with the interests at stake." *Id.* Citing *Santosky v. Kramer, supra,* the court ruled that the Division must prove by clear and convincing evidence that separating the child from his foster parents would cause "serious and enduring emotional or psychological harm." *Id.* at 19. Assuming that expert testimony and other evidence proved that the psychological injury was real rather than imagined, such injury could be attributed to the natural parents if the substitute care relationship had been allowed to develop over a period of time within which the parents should have been more attentive to their parental responsibilities. The court held that "prolonged inattention by natural parents that permits the development of disproportionately stronger ties between a child and foster parents may lead to a bonding relationship the severing of which would cause profound harm – a harm attributable to the natural parents and cognizable under the standards set forth in *A.W., supra.*" *Id.* at 18 (citation omitted).

The New Jersey Supreme Court unambiguously held that a finding of parental unfitness at the time of the termination proceedings was not required if the Division could prove that serious and enduring emotional harm would befall a child who was removed from a foster care relationship. While the Court cautioned that only the highest quality of proof could support such an assertion, and cautioned as well that a trial court must evaluate a

substitute parental relationship along with the birth parent relationship, it certainly did not hold that a theory emphasizing the great importance to be given to a psychological parenting relationship between a child and foster parent could be considered "unsound" because it is "controversial". *Id.* at 22. The trial court in this case reviewed the evidence a second time in light of the *J.C.* and *K.L.F.* decisions. It found that the proofs met the required strict standards. The appellate court commended the trial judge's "thorough and thoughtful consideration [of] the proofs before him and [of] the teaching of *J.C.* and *K.L.F.* and the earlier cases." (Pa3a).

While a state may require a finding of parental unfitness as a matter of legislative policy, this Court has never held that a finding of present parental unfitness is constitutionally mandated. In *Stanley v. Illinois, supra,* the Court held that every birth father, even one of an illegitimate child, had the right to a hearing to determine whether or not parental rights should be terminated. The state statute under consideration in that case required that lack of parental fitness be found before granting an adoption over a parent's objection. The constitutional infirmity found in the statute was simply that the state was required to show unfitness as a prerequisite to parental rights termination in every case except that involving fathers of illegitimate children. *Id.* at 405 *U.S.* 649. This Court did not address whether a finding of current parental unfitness was constitutionally required in every termination proceeding.

In *Quilloin v. Walcott,* 434 *U.S.* 246 (1978), this Court found no constitutional infirmity in a Georgia proceeding which allowed application of a best interests standard to

effect an adoption over the objection of the child's birth father who had never lived with or accepted any responsibility for the child's upbringing. Under the circumstances of that case, this Court held that the father's substantive due process rights were not violated by the lack of a finding of parental unfitness. Again in *Lehr v. Robertson*, 463 *U.S.* 248, 266 (1983) the Court considered the existence of a "substantial relationship" to be a constitutionally legitimate factor in determining appropriate procedures for adoption proceedings. At issue in that case was a New York statute which required notice of adoption proceedings to be served on a putative father only if he maintained his address in the "putative father registry". (The petitioner in that case did not fall into any other class of fathers who were required by the statute to be notified of adoption proceedings.) The Court found no constitutional infirmity in the procedure which did not require notification of the father despite the fact that the state had actual notice of his existence and whereabouts. In arriving at its conclusion that the child was properly adopted when she was approximately two years old by her mother's husband, without allowing her putative father to interpose an objection, the Court noted that "the existence or non-existence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child". *Id.* at 266.

Petitioners cite *Santosky v. Kramer, supra* for the proposition that "until the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Id.* at 760. Petitioners go on to contend that New Jersey's best

interests standard ignores this guidance. Implicit in Petitioners' argument is the equating of the parental unfitness discussed in *Santosky v. Kramer* with a finding of parental unfitness at the time of the termination trial. Nowhere in that or in any other case does support exist for such a proposition. In the instant case, for example, the court did not simply find that the child's relationship with his foster parents was of such significance that it should not be disturbed. Rather, the court found that the lengthy placement of Petitioners' children in foster care was necessitated by the natural parents' prolonged failure to correct the conditions that led to the placement. The court found that the combination of the parents' personal and legal problems – their intense and violent marital discord, their inability to concentrate on finding appropriate and stable housing, their failure to correct the problems noted by psychological evaluations – extended *the duration* of the foster care placement. In addition to its findings that the parents' own conduct was the major factor in the length of the placement, the court also found that O.G.'s placement in foster care took place during a critical period in his psychological development, leading to an intense attachment to his foster parents which could not be broken without his suffering severe psychological consequences (Pa8a).[2]

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[2] Contrary to Petitioners' view (Pb12-18), this action was brought by the Division of Youth and Family Services against the Petitioners on behalf of the child. The foster parents were neither parties nor witnesses in the matter. The assertion that the State agency "fought the foster parents' battle for custody of O.G." (Pb18) is both legally inaccurate and factually untrue.

Therefore, the trial court in this case did find that the parents' own unfitness contributed substantially to the development of the youngest child's substantial psychological ties with his foster parents, ties which could not now be broken without catastrophic consequences for the child (Pa10a-11a). Such a conclusion does place responsibility on the birth parents, where it properly belongs, and does constitute a finding of unfitness that would meet constitutional standards. Such a finding implicitly recognizes the reality noted by the dissent in *Santosky*, namely, "the child has an interest in the outcome of the fact finding hearing, independent of that of the parent. The child's interest in a continuation of the family unit exists only to the extent that such a continuation would not be harmful to him. An error in the fact finding hearing that results in a failure to terminate a parent-child relationship which rightfully should be terminated may well detrimentally affect the child." *Santosky, supra* at 788-789. Thus, to say that the court failed to make a finding that the parents were *currently* unfit certainly does not mean that the court failed to evaluate the parents' conduct over an extended period of time and to weigh that conduct accordingly.

While no one disputes that parental rights are of constitutional significance, neglect of parental responsibility does not enjoy constitutional protection. *Parham v. J.R., supra.* A parent undeniably has a substantial constitutional interest in maintaining family ties. Yet, where that relationship produces substantial harm to the child, the state has a compelling interest, because of its *parens*

patriae role, in acting to prevent harm to the child. *Wisconsin v. Yoder, supra.* Parental conduct which is constitutionally protected is that conduct which does not "deprive the child of essential needs". *In re William L.*, 338 *A.*2d 1228 (Sup. Ct. of Penn. 1978). The latter case also recognized its jurisdiction's constitutional mandate that, where the parents' rights and the child's "essential physical and emotional needs" are in conflict, the interests of the child "the weaker party" should prevail. *Id.* at 1236.

As a matter of constitutional law, therefore, a finding of present parental unfitness is not mandated in a termination case. Rather, a finding that a parent's failure to take available steps in a timely fashion to remedy the need for a placement constitutes parental unfitness is constitutionally permissible. That was the finding made in this case.

Finally, federal courts have been unusually reluctant to interfere in the decisions of state courts in matters of family law. *United States v. Yazell*, 382 *U.S.* 341 (1966). As this court held in *Lehman v. Lycoming County Childrens Services*, 458 *U.S.* 502 (1982):

> there is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home", under the care of his parents or foster parents, especially when such uncertainty is prolonged. Extended uncertainty would be inevitable in many cases if federal courts had jurisdiction to relitigate state custody decisions. [*Id.* at 513]

Indeed in the case at bar, the state court refused to grant a stay of the petition for adoption of this child by his foster parents. To disrupt the stability that this five year old

child has finally achieved by being adopted would be a tremendous and completely unwarranted disruption of his life.

Conclusion

For the reasons stated herein, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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